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No. 15-474

In the

Supreme Court of the United States

ROBERT F MCDONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF BENJAMIN TODD JEALOUS, DELORES L. MCQUINN, AND ALGIE T. HOWELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Benjamin Todd Jealous, Rhodes Scholar and immediate past president and chief executive officer of the National Association for the Advancement of Colored People ("NAACP"), the Honorable Delores L. McQuinn, 70th District, Virginia House of Delegates, and the Honorable Algie T. Howell, Jr., Vice-Chair of the Virginia Parole Board, join together to file this brief as *amici curiae* in support of Petitioner Robert F McDonnell.

Mr. Jealous has dedicated his life to social justice issues and civil rights. As a college student at Columbia University, he worked as an organizer for the NAACP Legal Defense Fund. Later, in Mississippi, he assisted the NAACP with obtaining full state funding for three historically African-American colleges, thereby ensuring they would remain open.

Rev. McQuinn is an associate pastor at the Mount Olivet Baptist Church in Richmond, Virginia, and represents the 70th District of Virginia in the House of Delegates. A resident of Richmond for many years, she has had a lifelong commitment to political activism at the local and state levels.

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[1] Pursuant to Sup. Ct. R. 37.3(a), amici certify that both parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to Sup. Ct. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

Mr. Howell currently serves as the Vice-Chair of the Virginia Parole Board after more than a decade of representing the 90th District in the Virginia House of Delegates. His commitment to the fair administration of justice is exemplified by his current service on the Parole Board and past service as the President of the Norfolk Chapter of the Southern Christian Leadership Conference.

Mr. Jealous, Rev. McQuinn, and Mr. Howell have spent their careers fighting for and protecting the individual rights of African-Americans and other disadvantaged minorities. They recognize that one of the greatest challenges to achieving fairness for disadvantaged minorities targeted by the criminal justice system is preventing vague criminal statutes from being wielded arbitrarily or disproportionately against such groups.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should not employ the constitutional avoidance canon to narrow the reach of the "honest services" mail and wire fraud offense. Instead, the Court should hold that such deliberately vague criminal laws are facially invalid.

At various times in our history, legislatures have enacted deliberately vague criminal laws. Executive authorities have deliberately employed such laws to target political dissidents, homosexuals, African Americans, the civil rights movement, and other disfavored and marginalized segments of society. The Court has repeatedly invalidated convictions under these laws as violations of due process.

Here, faced with another challenge to a vague criminal statute, the Court should consider the long history of vague criminal statutes and its own vagueness doctrine case law. This history shows that intentionally vague criminal laws have allowed arbitrary or discriminatory enforcement, by all levels of government, against disfavored segments of American society. Such threats are matters of current events as much as history. The continuing, contemporary evils of vague criminal laws, which the federal government has found to have contributed to the governmental abuses recently publicized in Ferguson, Missouri, should also inform the Court's analysis in this case. The Court's ruling here will affect much more than just future defendants in "honest services" fraud cases.

Whatever may be the virtue of the canon of constitutional avoidance in other arenas, it should not be invoked to save unconstitutionally vague criminal statutes, for several reasons.

First, the canon rests on a presumption that the legislature must not have intended an unconstitutionally vague statute when it could have intended a sufficiently precise one. But the history of criminal vagueness doctrine generally, and the history of the "honest services" variation on mail and wire fraud in particular, teaches just the opposite: for this class of laws, unconstitutional vagueness is often a matter of design rather than accident.

Second, in contrast to vague civil statutes, vague criminal statutes risk both greater ultimate harm to those convicted and greater provisional infringement of liberty for those merely suspected. Such statutes

risk shame and total deprivation of liberty for those convicted and imprisoned. And they enable greater infringements on the liberty of the innocent by expanding the range of potential crimes used to justify intrusive investigation of the citizenry—particularly the more marginalized among us.

Third, the temptation for legislatures to enact and executives to abuse vague criminal laws is strong, and the reluctance of lower courts to invalidate them is great. The knowledge that the judiciary will look first to develop a saving construction for an ambiguous criminal statute can only encourage the continued use of such statutes and reduce the impact of decisions refusing to enforce them.

ARGUMENT

I. The Vagueness Doctrine for Criminal Law is Vital in Enforcing the Due Process Clause.

The Fifth Amendment guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Where the Government undertakes such a deprivation "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015), the Court will strike down the statute as "'violat[ing] the first essential of due process,'" *id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

The concerns underlying the vagueness doctrine apply with greater force in the context of criminal statutes. *See Connally*, 269 U.S. at 393 ("A criminal statute cannot rest upon an uncertain foundation. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."). Indeed, vague criminal laws fundamentally undermine the relationship between the government and the governed.

First, a criminal statute that fails to give the public fair notice of what it prohibits may well serve to "trap the innocent," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), by disabling the "ordinary citizen [from] conform[ing] his or her conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (opinion of Stevens, J.). Citizens are entitled to know what the law says: "[l]iving under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

In addition, a vague criminal statute can impermissibly "delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-09. The Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions,

narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008) (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-71 & n.35 (1997)).

The Court's vigilance is especially critical in the criminal context because "misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, [and] proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties." *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting).

II. A Vagueness Challenge to a Criminal Law Should be Judged in the Context of the Country's Long and Varied History of Using Such Laws to Target Disfavored Groups.

The Court's scrutiny of a vague criminal law should consider the context provided by history. Here, the Court should consider the long and ongoing history of the selective use of vague criminal laws to target and oppress disfavored segments of American society. The Court's careful scrutiny is all the more important because legislators continue to enact vague criminal laws, and executive branch officials continue to use the unbounded discretion such laws afford to persecute a variety of political opponents or disfavored groups.

The Alien Act

The threat of vague criminal legislation and the invocation of the Due Process clause as a shield

against it date to the infancy of the Republic. The earliest and perhaps most notorious example was the Alien Act of 1798, ch. 58, § 1, 1 Stat. 570, 571 (Alien Act). The Federalist-controlled Congress passed the Alien Act along with the Sedition Act in 1798 to undercut Republicans domestically and neutralize politically adverse French immigrants and visitors during the young republic's undeclared naval war with France. John C. Miller, *Crisis in Freedom, the Alien and Sedition Acts* 41 (1951). The Alien Act authorized the President to order the expulsion of "all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof" and made noncompliance a crime punishable by up to three years in prison. Alien Act § 1.

In response, James Madison authored the famous Virginia Resolutions of 1798 denouncing the laws, and he warned that the Alien Act in particular "bestows upon the President despotic power over a numerous class of men." 4 J. Elliot, Debates on the Federal Constitution 531 (2d ed. 1836) (J. Madison) (Elliot's Debates). Madison further warned that the vagueness of the statute effectively allowed the executive branch to legislate and to criminalize whatever conduct it wanted:

> To determine, then, whether the appropriate powers of the distinct departments are united by the act authorizing the executive to remove aliens, it must be inquired whether it contains such details, definitions, and rules, as

> appertain to the true character of a law; especially a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.
>
> The Alien Act declares "that it shall be lawful for the President to order all such aliens as he shall judge *dangerous* to the peace and safety of the United States, or shall have reasonable ground to *suspect* are concerned in any treasonable or *secret machinations* against the government, thereof, to depart," etc.
>
> Could a power be well given in terms less definite, less particular, and less precise? To be *dangerous to the public safety*—to be *suspected of secret machination* against the government; these can never be mistaken for legal rules or certain definitions. They leave every thing to the President. His will is the law.

4 Elliot's Debates at 560 (J. Madison) (emphases in original).

The statute expired under its own terms after two years, and the controversy never reached the Court. But the Alien Act, along with its sister law, the Sedition Act, have entered history as bywords for abusive and clearly unconstitutional legislation. And the Act's history shows two things relevant to the Court's analysis today. First, the temptation for a legislature to provide an executive with vague, standardless criminal laws is so strong that even some of the Founders' generation succumbed to it

Second, others of the Founders immediately and vigorously denounced its unconstitutionality, particularly its contravention of the Due Process clause.

Mann Act

The Mann Act, 36 Stat. 825 (1910), known then as the "White Slave Traffic Act," made it a felony to "transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose " Its stated purpose was "*solely* to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." *Caminetti v. United States*, 242 U.S. 470, 498 (1917) (McKenna, J., dissenting) (quoting Cong. Rec. vol. 50, pp. 3368, 3370) (internal quotation marks omitted; emphasis added). In practice, however, the statute was "used to further police the sexuality of white women by prosecuting black men for engaging in consensual interracial relations." Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. Rev. 1464, 1494 (2015).

The most notorious misuse of the Mann Act involved boxer Jack Johnson, who became the first African American heavyweight world champion in 1908.[2] Committee to Pardon Jack Johnson, Petition

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[2] Johnson was but one African American victim of Mann Act prosecutions. *See* Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 Tex. L. Rev.

for Pardon to the President of the United States 10-11 (2004) (Petition for Pardon).[3] Shortly after winning the title, the United States began investigating Johnson for alleged violations of the Mann Act, and he was convicted of transporting a Caucasian female across state lines for immoral purposes. *Johnson v. United States*, 215 F 679, 683 (7th Cir. 1914) (affirming conviction "for the immoral purpose of having sexual intercourse").

A few years after *Johnson*, the Court upheld the constitutionality of the Mann Act in *Caminetti v. United States*, a case which involved two other instances of transporting women "for the purposes of debauchery, and for an immoral purpose," without the expectation of pecuniary gain by the defendants. 242 U.S. 470, 486 (1917). Dissenting, Justice McKenna recognized that prosecutors were using the vague term, "immoral purpose," improperly to target groups and behavior they found offensive but which did not properly fall within the purview of the act. *Id.* at 502 (McKenna, J., dissenting).

739, 754 (2006) (citing Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 67 (2001)). Indeed, to prevent interracial marriage, prosecutors would sometimes charge African American males who "attempted to travel with their white fiancées to states that permitted interracial marriage with abduction or white slavery." *Id.*

[3] Available at http://www-tc.pbs.org/unforgivableblackness/knockout/pardon_petition.pdf.

Attacks on Civil Rights Leaders in the 1960s

In a series of cases in the 1960s, the Court invalidated several vague criminal statutes that state and local officials wielded to suppress peaceful protests and harass civil rights leaders. These vague public nuisance statutes, purposefully free from any overt impermissible animus, became vehicles for state and local officials to abuse their law enforcement discretion.

For instance, in *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court heard a challenge to South Carolina's breach of peace statute under which 187 black students were convicted following their participation in a nonviolent protest. In reversing the convictions and striking the law as unconstitutionally vague, *id.* at 238, the Court noted:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

Id. at 236-37 The fundamental ill of vague criminal laws, as observed by the Court, is that the manner in which such laws are enforced is left to the whims and prejudices of the executive, which easily can be turned on particular minority or other disfavored groups.

Cox v. Louisiana, 379 U.S. 536 (1965), provides another example in which the Court reversed the breach-of-peace conviction of a civil rights leader who led a nonviolent protest march. Striking the law as "unconstitutionally vague in its overly broad scope," *id.* at 551, the Court reiterated that "'[a] statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment,'" *id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1915)).

Likewise, the Court in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), reversed the loitering conviction of a civil rights leader who was arrested while standing on a sidewalk with a number of companions. In reversing the conviction, the Court noted that the anti-loitering statute at issue:

> [l]iterally read says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."

Id. at 90 (quoting *Cox*, 379 U.S. at 559).

Persecution of Homosexuality

Until quite recently, prosecutors selectively used vague sodomy and lewdness laws to punish homosexuality and other disfavored sexuality. The American history of such use appears to have dawned with early colonists. The Plymouth colony buttressed its sodomy prohibition (a capital offense) with a broader crime called "lewd behavior," which could be used as the authorities liked against either homosexual relations that did not meet the definition of sodomy or extramarital heterosexual relations. *See Lesbians, Gay Men and the Law* 48-49 (William B. Rubenstein, ed. 1993). Legislative unwillingness to specify what sexual activity law enforcement should penalize criminally proved no impediment to enforcement until the late twentieth century. As late as 1972, the Missouri Supreme Court found that, the "euphemism 'the detestable and abominable crime against nature,' conveys to a person of common intelligence and understanding, and to the public at large, an adequate description of the acts which are prohibited, and fixes an ascertainable standard of guilt within the requirements of the constitutional provisions invoked." *State v. Crawford*, 478 S.W.2d 314, 318 (Mo. 1972). It therefore held that prosecution under the statute, at least as applied to oral sex between men, did not violate due process.

Criminal lewdness laws were vague enough to allow enforcement against drag performances, and they were so deployed against homosexual-oriented drag rather than cross-dressing aimed at

heterosexual audiences. For instance, the heterosexually suggestive performance of Marilyn Monroe, the drag performance of Jack Lemon and Tony Curtis, and the humorously implied possibility of a homosexual encounter made 1959's *Some Like it Hot* hugely popular and somewhat controversial.[4] Yet fully clothed, humorous drag cabaret acts aimed at homosexual audiences were actively prosecuted under criminal cross-dressing and lewdness ordinances. *See, e.g., D.C. v. City of St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986) (holding the ordinance unenforceable because its vagueness violated the due process guarantee of the Fourteenth Amendment). Similarly, in Los Angeles, "holding hands, kissing, or dancing" were all considered by the police as crimes falling within the scope of the city's lewdness ordinance—when such mild displays of affection were homosexual. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 841 (1997). *See also id.* at 861-63 (collecting anti-cross-dressing or "masquerading" ordinances aimed

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[4] The movie was screened nationwide to mainstream audiences, and although it drew complaints, there are no reported efforts to prosecute its stars or producers. *See* "Some Like it Hot," American Film Institute, Catalogue of Feature Films, available at http://www.afi.com/members/catalog/DetailView.aspx?Movie=53017 (summarizing plot and controversy, including complaints of "transvestism," "clear inference of homosexuality and lesbianism," suggestive costuming, and dialogue that amounted to "outright smut").

at homosexuals and chronicling their demise under vagueness challenges).[5]

Authorities who despised homosexuality continued to prosecute homosexual activity under such statutes until recently. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding use of Georgia sodomy law insofar as it criminalized consensual homosexual activity in the home), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). *See also id.* at 220 n.13 (noting that selective enforcement of statute may render true meaning unconstitutionally vague) (Blackmun, J., dissenting).

Other Disfavored Groups and Individuals

Vague criminal statutes have proved versatile enough to harm many other individuals, groups, and behaviors disfavored by authorities. For instance, the Court in 1972 heard a challenge to an anti-vagrancy statute that disproportionately affected "poor people, nonconformists, dissenters, [and] idlers." *Papachristou*, 405 U.S. at 170. There, authorities used the statute to prosecute men and women of different races seen out in public together. *Id.* at 158-60. Reversing the convictions and striking the law as unconstitutionally vague, the Court observed:

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[5] In addition to homosexuals, other sexual minorities were targeted by selective enforcement of these laws as well. *See generally* Willliam N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1017-32 (1997).

> The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.

Id. at 170.

Suspected gang members and those who may be present in their proximity were also targeted by an ambiguous anti-loitering statute. In *City of Chicago v. Morales*, the city had passed such an ordinance that gave "absolute discretion to police officers to decide what activities constitute loitering." 527 U.S. 41, 61 (1999) (internal quotation marks omitted). The Court held that this absolute discretion means there were no "'minimal guidelines to govern law enforcement,'" as required by the Court's vagueness precedent. *Id.* at 60 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). The Court noted the city's clear interest in curbing gang activity, *id.* at 47, but nevertheless struck the ordinance, finding such unfettered discretion to law enforcement violated the basic guarantees of due process.

Finally, the Court just last term invalidated the "residual clause" of the Armed Career Criminal Act (ACCA), which had a disproportionate impact on minorities. *See* U.S. Sentencing Comm'n, Mandatory

Minimum Penalties in the Federal Criminal Justice System 283 tbl. 9-4 (2011) (showing that in 2010, 68% of those subject to the ACCA were black or Hispanic, and 99% were men). In striking the residual clause, the Court found both that the statute "denies fair notice to defendants and invites arbitrary enforcement " *Johnson*, 135 S.Ct. at 2557 This mandatory minimum sentencing provision, the type of which the Court previously noted "can produce unfairly disproportionate impacts on certain kinds of offenders," *Almendarez-Torres v. United States*, 523 U.S. 224, 245 (1998), was also of the type that often "transfer[s] sentencing power to prosecutors, who can determine sentences through the charges they decide to bring," *Harris v. United States*, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in judgment). Indeed, the Court found that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S.Ct. at 2560.

Contemporary Abuse of Vague Criminal Laws in Disadvantaged Communities

Abuse of vague criminal laws is not merely a matter of history; it taints the country's law enforcement and infringes on Americans' liberty to this day.

Ferguson, Missouri erupted in widespread protest and civil disturbance after a Ferguson police officer shot to death an unarmed young black man named Michael Brown in August, 2014. The U.S. Department of Justice opened an investigation into

the Ferguson Police Department, which culminated in a March, 2015 report that found "Deeply embedded constitutional deficiencies." *See* U.S. Dep't of Justice, Investigation of the Ferguson Police Dep't, at 6 (Ferguson Report).[6] Among the chief ills the federal government found was a police approach "geared toward aggressive enforcement of Ferguson's municipal code," leading many officers to "appear to see some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue." *Id.* at 2.

That aggressive adversarial and revenue-seeking approach to law enforcement found a basis in an unconstitutionally vague criminal law. Ferguson Mun. Code § 29-16(2) is a typical government stop-and-identify law that makes it a crime for anyone to "[f]ail to give information requested by a police officer in the discharge of his/her official duties relating to the identity of such person." *See* Ferguson Report at 20-22. "[T]he term 'information relating to the identity of such person' in Section 29-16(2) is not defined." *Id.* at 20. The law thus empowers individual officers to demand any information "relating" to identity they please, and arrest anyone who refuses to provide information as esoteric and intrusive as his social security number. *Id.* The Justice Department concluded that the ordinance "is

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[6] Available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

likely unconstitutional on its face." *Id.* at 21 (citing, *inter alia*, *Kolender*, 461 U.S. 352 (1983)). But unconstitutional facial ambiguity—fully 30 years after a relatively similar statute was declared unconstitutional in *Kolender*—proved no impediment to the Ferguson government. Rather, the people of Ferguson suffered years of arbitrary, abusive, and discriminatory enforcement until widespread protests drew national attention to such abuse.

This history shows that the Court's message that vague and ambiguous criminal laws violate due process continues to go unheard for many Americans, particularly in disadvantaged communities.

III. This Court Should Not Rehabilitate Intentionally Vague Criminal Laws Under the Canon of Constitutional Avoidance.

The Court should not attempt to salvage the otherwise unconstitutionally vague "honest services" crime through the canon of avoidance of constitutional controversies. First, the presumption that the legislature did not intend an unconstitutional interpretation, the canon's factual predicate, is unwarranted here. Second, vague criminal laws pose much more severe threats to liberty than do vague civil ones. Third, straining to save unconstitutionally vague criminal laws will merely invite their continued enactment and enforcement.

Congress Did Not Intend a Crime That Comports With Due Process

When the Court addressed the honest services fraud statute in *Skilling v. United States*, it relied on the canon of avoidance of constitutional infirmities and adopted a narrowing construction, limiting the doctrine to a bribery-and-kickback core. It deduced this core from pre-*McNally* case law "to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible." 561 U.S. 358, 406 (2010) (citation omitted). In doing so, the Court rejected Justice Scalia's argument offered in his concurring opinion that no sufficiently clear definition of the crime could be found in that pre-*McNally* precedent. *Id.* at 420 (Scalia, J., concurring in part and concurring in judgment). The Court did not, however, pause to examine an assumption apparently shared by both the majority and Justice Scalia in *Skilling*: that Congress intended to enact something consistent with due process and the canon of constitutional avoidance applies.[7]

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[7] As the court recognized in its last term, ongoing judicial difficulty giving meaning to a statute is an indicator of vagueness that can justify declaring it unconstitutional despite prior judicial savings constructions. "Nine years' experience trying to derive meaning from the residual clause [of the Armed Career Criminal Act] convince[d]" the Court that it had "embarked on a failed enterprise." *Johnson*, 135 S. Ct. at 2560. If nine years of confusion was sufficient to confirm the vagueness of the residual clause, the decades of conflicting judicial opinions on intangible rights in the mail- and wire-fraud statutes, and about the scope of "honest services" in particular, justify reconsideration of the Court's holding in *Skilling*.

Here, the evidence suggest that Congress did *not* intend to enact a statute consistent with due process. On the contrary, the fairest reading of Congress's intent in passing 18 U.S.C. § 1346 is that it "intended merely to overturn the *McNally* decision. *No other change in the law is intended.*" *United States v. Brumley*, 116 F.3d 728, 742-43 (5th Cir. 1997) (quoting 134 Cong. Rec. H11, 108-01 (daily ed. Oct. 21, 1988) (emphasis added)). The legislature did not define "honest services" fraud either directly or by reference to any of the many judicial opinions that had arisen over the preceding decades creating the offense or construing its contours. Section 1346 added a label, not a definition, to the mail and wire fraud crimes, leaving defendants to learn from prosecutors and judges what conduct thereunder they would elect to criminalize.

Congress thus implicitly rejected the Court's request in *McNally* that it "speak more clearly" concerning the scope of the mail- and wire-fraud crimes. *United States v. McNally,* 483 U.S. 350, 360 (1987). Through simple reinstatement of "honest services" fraud with no specification of the doctrine's meaning, Congress attempted to pass the buck to either the judiciary or the executive branch to define the crime, in violation of defendants' long-established due process protections.

As discussed above, legislatures have historically enacted vague criminal statutes that to allow executives to target enemies or to allow abusive practices to evade curbing by the judiciary. The mail- and wire-fraud statutes, including Section 1346, however, reflect a a modern Congressional "penchant

for speaking only in very broad and vague terms in criminal legislation " Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 655 (2006).

> Federal statutes consistently and seriously err on the side of over-inclusiveness. In addition to being overbroad, many statutes lack definition—that is, they are vague. In recognition of the grievous lack of specificity in many statutes subject to criminal sanction, courts regularly add definitions, or even elements, to existing offenses to "cure" any due process difficulties.

Id. at 655-56. In other words, both the criminal code in general[8] and the "honest services" statute in particular suggest that Congress is simply indifferent to the due process requirement of

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[8] Professional organizations, think tanks, and professors have decried the high production rate and haphazard quality of Congressional criminal legislation in recent years. *See, e.g.*, James A. Strazzella, ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal* Law (1998) (available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf); Brian W. Walsh and Tiffany M. Josln, Heritage Foundation and Nat'l Ass'n of Crim. Defense Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010) (available at https://www.nacdl.org/withoutintent/); Julie R. O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv. J.L. & Pub. Pol'y 57 (2014).

specificity before resorting to the draconian sanction of criminalization.

The Court's precedent indicates that "the canon of constitutional avoidance" does not apply in such circumstances. The canon "is a tool for choosing between competing plausible interpretations of a statutory text, *resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.*" *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). *See also Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."). The canon may be an appropriate tool to resolve most legislative ambiguities, because ambiguity is rarely the goal of legislation. But the intentional, or at least knowing,[9]

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[9] The Court presumes that when Congress drafts laws that use judicially defined terms, it "knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken," *Morissette v. United States*, 342 U.S. 246, 263 (1952). In divining Congressional intent behind Sec. 1346, the Court should follow *Morissette*'s guidance and consider what was known when Congress acted. As the Court acknowledged in *Skilling*, "honest-services decisions preceding *McNally* were not models of clarity or consistency." 561 U.S. at 405. *Morissette*'s guidance that Congress adopts the entire "cluster of ideas" attached to such borrowed terms as "honest services," however, here supports the inference that Congress knew of the ambiguous entirety of "honest services" mail- and wire-fraud doctrine that had evolved before Congress enacted Sec. 1346 and intended to reinstate it. In fact, the opaqueness of an "honest services" object of fraud is just one layer of the ambiguity that existed in the offense when Congress acted in 1988. As now-Judge Rakoff noted in 1980, "the courts have neglected to develop any specific definition or delineation of the term 'scheme to defraud,' even

enactment of a legislature of a vague criminal statute is different.

Rather than invoke the constitutional-avoidance canon, the Court has repeatedly rejected efforts by the legislature to delegate to the judiciary the responsibility to define crimes. *E.g.*, *United States v. Reese*, 92 U.S. 214, 221 (1875).[10] It has equally rejected legislative efforts to grant to the executive branch rather than the judiciary the power to criminalize people or activities the executive deems undesirable. In such statutes, "the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police." *Papachristou*, 405 U.S. at 165. The Court has noted:

> These statutes are in *a class by themselves*, in view of the familiar abuses to which they are put. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.

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though that is the real heart of the mail fraud offense." *See* Hon. Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 822 (1980).

[10] Indeed, the Court appears to have expressly considered and rejected the application of the constitutional avoidance cannon in such circumstances. *See Reese*, 92 U.S. at 220 (considering whether the overly broad voting-rights criminal provision could be given a narrow reading to bring it within the scope of the Fifteenth Amendment provision the government claimed authorized it); *id.* at 221 (explaining that "[t]o limit this statute in the manner now asked for would be [to] make a new law, not to enforce an old one.").

Id. at 166 (quoting *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting) (emphasis added)).

Some have argued that the lack of precision in such laws is a virtue because they allow prosecutors to keep up with antisocial behavior that evolves into new crimes faster than legislatures can keep up. *E.g.*, Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption Is "So Yesterday": Restoring Honest Services Fraud After* Skilling *and* Black, 12 U.C. Davis Bus. L.J. 1, 18-19 (2011). The breadth and flexibility of the mail and wire fraud statutes in particular have long made them the favorite of federal prosecutors. *See* Hon. Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev 771 (1980). In fact, the statutes are so flexible (from a prosecutorial perspective), or so vague (from a defense perspective), that they are universally credited with allowing federal prosecutors and the judiciary rather than the legislature to develop honest services fraud. *See, e.g.*, *United States v. Kincaid-Chauncey*, 556 F.3d 923, 939 (9th Cir. 2009), abrogated on other grounds by *Skilling v. United States*, 561 U.S. 358 (2010) (noting that "[f]or decades, federal prosecutors have used § 1343, as well as the substantially similar mail fraud statute, 18 U.S.C. § 1341, to develop a theory of honest services fraud.").

The Court has already answered this argument: "Of course" statutes such as these "are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application."

Papachristou, 405 U.S. at 171. Where, as here, deliberate breadth crosses over into deliberate ambiguity, the Court condemns it a constitutional flaw rather than a legislative virtue, no matter how practically useful for governmental law enforcement interests

Criminal Law Poses Unique Threats to Liberty

The second reason the Court should not construe the "honest services" statute to save it is a broader one: vagueness in criminal law poses unique threats not presented by most statutes to which the canon might be applied. The unique substantive importance of criminal law is long-established and well understood: "[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy." Herbert Wechsler, *The Challenge of A Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

Criminal law also poses unique threats to the liberty of those who are never charged. The investigation of a potential criminal offense generally allows law enforcement to intrude on search and seizure protections otherwise guaranteed by the Fourth Amendment. Criminal investigations can even include physical intrusion upon the person being investigated. For instance, reasonable fear of the presence of a weapon combined with a reasonable suspicion "that criminal activity may be afoot," generally allows police to stop and physically frisk people they encounter. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Thus, allowing vague criminal offenses to remain enforceable, even subject to a narrowing

construction imposed by the Court, has the practical effect of allowing greater offensive intrusions into the day-to-day life of citizens—especially citizens in communities that are the focus of such enforcement efforts. As one recent district court observed:

> While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention.

Floyd v. City of New York, 959 F Supp. 2d 540, 557 (S.D.N.Y. 2013), vacated in part by *Ligan v. City of New York*, 743 F.3d 362 (2d Cir. 2013). Vagueness in criminal codes enforced by the police allows law enforcement a broader basis for investigative intrusion on the populace, or at least the segments that law enforcement elects to target. Thus, vague criminal laws threaten not merely more severe consequences than vague civil ones for those found to transgress; they also threaten much more infringement on liberty for those never charged.[11]

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[11] The rationale of the rule of lenity similarly supports simply refusing to enforce rather than editing unclear statutes when they threaten criminal condemnation. The Court has always recognized that, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not

The Court Should not Encourage Vague Criminal Legislation by Developing Saving Constructions

Finally, resort to a saving construction of a vague criminal statute will invite continued enactment and enforcement of vague criminal laws. Half-measures in due process vagueness jurisprudence have not worked. As noted above, law enforcement continued to abuse the Ferguson municipal stop-and-identify law for decades after the Court's guidance should have made clear the unconstitutional vagueness of such laws. The same was true of vague loitering laws selectively enforced against homosexuals: "Even when legal challenges prevailed, the police often continued to enforce invalid laws." William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 858 (1997) (recounting Denver police department's continued arrest of gays under first the state and then the city's lewd-loitering law, despite each being invalidated).

The history of the mail- and wire-fraud statutes in particular illustrate the ineffectiveness of judicial

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courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). The rule of lenity "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

efforts to fill in the definitional blanks Congress has left in these laws.

> Forty-odd years after individuals started going to prison under [the "honest services"] theory of liability, the Supreme Court decided in *McNally v. United States* that [a]ll those individuals who had been adjudged criminals, and who had served jail time, for depriving others of an intangible, non-property right to "honest services," were, in fact, not guilty of any crime under the mail and wire fraud statutes. The essence of the Supreme Court's objection to these cases was that they permitted federal prosecutors to pursue state and local public officials for, among other things, political patronage schemes that prosecutors may have found offensive but that were not improper under state law.

Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 662 (2006).

Given the long-standing and ongoing threat that similarly vague criminal laws pose,[12] the Court

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[12] The Court should be particularly concerned when it reflects on the multiplier effect of the modern plea-bargain system of criminal justice: the cases that receive judicial review are but a tiny fraction of those actually affected. Between July 1, 2014 and June 30, 2015, federal courts heard 2064 criminal trials—2.5% of the 81,179 total number of criminal cases disposed of in that period. Statistical Tables for the Federal Judiciary, Table D-4 (June 30, 2015) (available at http://www.uscourts.gov/file/18987/download).

should not resort to a canon of interpretation to define the crime, thereby implicitly inviting both the federal and state governments to continue such due process violations. *See Papachristou*, 405 U.S. at 165 (explaining that "the due process implications are equally applicable" to federal or state ambiguous criminal statutes).

Experience shows that firmer measures, such as simply declaring deliberately vague criminal laws unenforceable because they conflict with the Constitutional guarantee of due process, are necessary. The Court as much as Congress should speak more clearly.

CONCLUSION

This Court should hold that deliberately vague criminal statutes should be invalidated rather than judicially construed to avoid constitutional infirmity. The judgment below should therefore be reversed.

Respectfully submitted,

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